CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]35

GRANT SMITH-PORTER SHIP COMPANY

vs.

HERMAN F. BOHDE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 14, 1922.

(27,513)

(27,619)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 864.

GRANT SMITH-PORTER SHIP COMPANY

vs.

HERMAN F. ROHDE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 19, 1920.

1 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3470.

GRANT SMITH-PORTER SHIP COMPANY, a Corporation, Appellant,

vs.

HERMAN F. ROHDE, Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States under Section 239, Judicial Code.

Before Morrow and Hunt, Circuit Judges.

This cause came to the Circuit Court of Appeals for the Ninth Circuit upon an appeal from the United States District Court of Oregon from a judgment in favor of the appellee as libelant in that court, and against the appellant as libelee in that court, for the sum of $10,000. The cause was a libel in admiralty for damages for injury sustained.

Libelant, Herman F. Rohde, received injury while at work on a partially completed vessel lying at a dock in the Willamette River forming a part of the shipbuilding plant of respondent, Grant
2 Smith-Porter Ship Company. The character of the work being done by libelant and the operations of respondent of which the work formed a part are as follows:

Respondent, Grant Smith-Porter Ship Company, at and prior to the time of libelant's injury was engaged in constructing steam vessels for the United States government under contract with United States Shipping Board Emergency Fleet Corporation. One of these steam vessels was the steamer "Ahala." Prior to the time of libelant's injury this steamer had been launched in the Willamette River at Portland, Oregon, which river is a part of the navigable waters of the United States. At the time of libelant's injury, April 10, 1919, the vessel had been substantially completed, but was not ready for delivery and all of the work in process at the time of libelant's injury was work pertaining to the construction of the vessel by respondent, Grant Smith-Porter Ship Company. Libelant's work was that of a carpenter or joiner and at the time of the injury he was at work constructing a bulkhead enclosing certain tanks in the vessel.

Libelant began this proceeding in personam against respondent in the District Court of the United States for the District of Oregon sitting in admiralty. Negligence of the employer, respondent Grant

Smith-Porter Ship Company, in the construction and maintenance of a scaffold is alleged as the ground for recovering of damages.

At and prior to the time of libelant's injury, there was in effect the so-called "Workmen's Compensation Law" of the State of Oregon (Chapter 112, Laws of Oregon, 1913, as amended Chapter 271 Laws of 1915, and Chapter 288 Laws of 1917.) The law applied to hazardous occupations (including shipbuilding) within the
3 State of Oregon. An option is given both to employers and workmen to accept the compensation law or to reject it; that is, both employers and workmen are required to notify the proper state authority if it is desired not to come under the act. Without such notice, the law is applicable and payments are required to be made by the employer, which payments include deductions from the wages of workmen. Workmen who thus come under the act are entitled to receive certain specified payments in the event of injury, and the act provides (Section 12):

"And the right to receive such sum or sums shall be in lieu of all claims against his employer on account of such injury or death, except as hereinafter specially provided."

At and prior to the time of libelant's injury, respondent was engaged in shipbuilding operations on the Willamette River at Portland within the State of Oregon; and libelant was in its employ as a carpenter or joiner in such shipbuilding operations. Prior to the time of the injury, neither respondent, the employer, nor libelant, the workman, had notified the appropriate state authority of any rejection of the provisions of the Workmen's Compensation Act, and up to the time of the injury, respondent, the employer, had taken all the steps required by the compensation act to bring the work under its provisions; and there had been deducted and paid over to the commission administering the compensation fund payments from wages earned and paid libelant, the workman, up to the time of the injury. Payroll deductions from the wages of libelant and other workmen were made without regard to whether or not the work done by such workman was on vessels under construction on the ways or vessels under construction after launching.

Questions of law concerning which the Circuit Court of Appeals of the Ninth Circuit desires the instruction of the Supreme
4 Court are:

1. Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?

2. Is libelant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?

WM. W. MORROW,
WM. H. HUNT,
Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

April 5, 1920.

[Endorsed:] Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239, Judicial Code. Filed April 5, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

A true copy:

Attest, April 5, 1920.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

5 [Endorsed:] No. 3470. United States Circuit Court of Appeals for the Ninth Circuit. Grant Smith-Porter Ship Co., a Corporation, Appellant, vs. Herman F. Rohde, Appellee. Certified copy of certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239, Judicial Code.

Endorsed on cover: File No. 27,619. U. S. Circuit Court Appeals, 9th Circuit. Term No. 864. Grant Smith-Porter Ship Company vs. Herman F. Rohde. (Certificate.) Filed April 16th, 1920. File No. 27,619.

No. [redacted]35

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1920

GRANT SMITH-PORTER SHIP COMPANY

v.

HERMAN F. ROHDE

BRIEF FOR GRANT SMITH-PORTER SHIP COMPANY

CHARLES H. CAREY
JAMES B. KERR
CHARLES A. HART

INDEX OF CASES

No. 304

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1920

GRANT SMITH-PORTER SHIP COMPANY

v.

HERMAN F. ROHDE

BRIEF FOR GRANT SMITH-PORTER SHIP COMPANY

STATEMENT

This case is here on certificate from the Circuit Court of Appeals for the Ninth Circuit. It originated in the District Court for the District of Oregon, and is a libel *in personam* for damages for personal injuries. Rohde, the libelant, was hurt while employed on a partially completed vessel afloat at a dock at the shipbuilding plant of the Grant Smith-Porter Ship Company in the Willamette River at Portland, Oregon. The cer-

tificate states the facts concerning the employment as follows:

> "Respondent, Grant Smith-Porter Ship Company, at and prior to the time of libelant's injury, was engaged in constructing steam vessels for the United States Government under contract with United States Shipping Board Emergency Fleet Corporation. One of these steam vessels was the steamer 'Ahala.' Prior to the time of libelant's injury this steamer had been launched in the Willamette River at Portland, Oregon, which river is a part of the navigable waters of the United States. At the time of libelant's injury, April 10, 1919, the vessel had been substantially completed, but was not ready for delivery and all of the work in process at the time of libelant's injury was work pertaining to the construction of the vessel by respondent, Grant Smith-Porter Ship Company. Libelant's work was that of a carpenter or joiner and at the time of the injury he was at work constructing a bulkhead enclosing certain tanks in the vessel."

The libel charged negligence in the construction and maintenance of a scaffold. Exceptions challenging jurisdiction in admiralty were overruled by the District Court, and the court, believing the Oregon Workmen's Compensation Law to be inapplicable, sustained the charges of negligence and allowed recovery. *Rohde v. Grant*

Smith-Porter Ship Co., 259 Fed. 304 and 263 Fed. 204.

The Workmen's Compensation Law of Oregon (Chapter 112, Laws of Oregon 1913, as amended by Chapter 271, Laws 1915, and Chapter 288, Laws of 1919), was in effect during Rohde's employment and injury. It applies to hazardous occupations—specifically including shipbuilding, and is effective unless either employer or workman by notice to the Industrial Accident Commission rejects the Act and elects not to come under its provisions. Without such notice the law applies and there are required of the employer fixed payments which include deductions from the workman's wages. In the event of injury compensation is provided for and the Act then says:

> "And the right to receive such sum or sums shall be in lieu of all claims against his employer on account of such injury or death, except as hereinafter specially provided."

At the time of Rohde's injury, the Ship Company was engaged in shipbuilding operations on the Willamette River at Portland, Oregon, and Rohde was in its employ as a carpenter or joiner in such shipbuilding operations. Neither he nor the Ship Company had rejected the State Compensation Act, but, on the contrary, the Ship Company had taken all the steps required by the Compensation Act to bring the work under its provis-

ions; and there had been deducted and paid over to the Commission administering the compensation fund payments from Rohde's wages up to the time of the injury. Pay roll deductions from the wages of Rohde and other workmen were made without regard to whether or not their work was on vessels before or after launching.

The certificate of the Court of Appeals asks first, if the fact that the alleged tort occurred on navigable waters is alone sufficient to establish jurisdiction; and second, (assuming an affirmative answer to the first question), if notwithstanding the provisions of the Oregon Compensation Law, the right to recover damages in admiralty still exists.

ARGUMENT

I.

1. A negative answer to the first question disposes of the controversy. If in tort cases admiralty jurisdiction requires not only the essential of locality, but also a transaction maritime in character, then the District Court was without jurisdiction. The work in which Rohde was engaged when injured was ship construction. His contract of employment with the Ship Company required services as a carpenter and joiner in the construction of a ship before and after launching; and neither before nor after launching is such work maritime in character.

The People's Ferry Co. v. Beers, 20 Howard 393.

Roach v. Chapman, 22 Howard 129.

The Winnebago, 205 U. S. 354.

Graham & M. Transportation Co. v. Craig Shipbuilding Co., 203 U. S. 577.

Rounds v. Cloverport Foundry & Machine Co., 237 U. S. 303.

North Pacific S. S. Co. v. Hall Bros. Marine Ry & S. Co., 249 U. S. 119.

In *Atlantic Transport Company v. Imbrovek*, 234 U. S. 52, this court sustained a libel for damages for injuries received by a stevedore while at work loading cargo in the hold of a ship. The Transport Company contended that maritime torts included only those involving injury to a vessel

or injury caused by the negligence of a vessel, and that circumstances of this kind in addition to the essential of locality were a jurisdictional requisite. The decision reviewed the cases which state the rule that admiralty jurisdiction in tort depends entirely upon locality, noting the Transport Company's assertion that in all these cases the subject matter of litigation was maritime in character, but concluded that a determination of the question was unnecessary; the decision holding that stevedoring work was maritime and the subject matter of the suit maritime in character. The court said:

> "As this court has observed, the precise scope of admiralty jurisdiction is not a matter of 'obvious principle or of very accurate history.' *The Blackheath* (*United States v. Evans*), 195 U. S. 361, 365, 367. And we are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature, and hence the District Court, from any point of view, had jurisdiction. * * *
>
> "The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of

this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' * * * If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters was quite sufficient. Even with respect to contracts where subject-matter is the exclusive test, it has been said that the true criterion is 'Whether it was a maritime contract, having reference to maritime service or maritime transactions.'"

2. It is quite true that the decisions stating the locality rule were made in cases in which the question under discussion was not involved. So far as we have been able to find this court has not been asked to sustain admiralty jurisdiction over torts which apart from the circumstance of locality were in no respect maritime. The much quoted statement of Mr. Justice Storey that,

"In regard to torts I have always under-

> stood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act,"

was made in *Thomas v. Lane,* Federal Cases No. 13902, which was a libel by a seaman for assault by a master and mate, and the question of locality was involved because the libel failed to show where the assault occurred. In *The Plymouth* (*Hough v. Western Transportation Co.,* 3 Wallace 20), the court said:

> "Every species of tort, however occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

The libel here was for damage to buildings by fire communicated from a vessel at anchor at a nearby dock; and jurisdiction was denied because the requirement of locality was not met. And in *North Pacific S. S. Co. v. Hall Bros. Co.,* 249 U. S. 119, in which the court observed that in matters of tort jurisdiction depends upon locality, admiralty jurisdiction was invoked to enforce a maritime contract performed partly on land and partly on water.

3. In one class of cases several times before this court, the test of locality alone has proven insufficient. Negligent operation of vessels resulting in damage to structures in channels is cognizable

in admiralty if the structure injured is in the channel for purposes of navigation and not otherwise; and this is true even though the structure is as firmly fixed to the bottom of the channel as are the piers of a railroad bridge.

Philadelphia W. & B. R. R. Co. v. Philadelphia etc. Towboat Co., 23 Howard 209.

The Blackheath (U. S. v. Evans), 195 U. S. 361.

Cleveland Terminal & Valley R. R. Co. v. Cleveland S. S. Co., 208 U. S. 316.

Martin v. West, 222 U. S. 191.

Latta & Terry Co. v. The Raithmoor, 241 U. S. 166.

In *Martin v. West* admiralty jurisdiction was denied because the bridge piers which were damaged by the negligent operation of the vessel were "essentially a land structure maintained and used as an aid to commerce on land." In *The Blackheath* and *The Raithmoor*, jurisdiction was sustained, the court saying (in *The Blackheath* case):

> "The damage was to property located in navigable waters, solely an aid to navigation and maritime in nature and having no other purpose or function."

In both these cases the property damaged was placed permanently in the bed of the stream; indeed in *The Raithmoor* case the piles were to be incased in steel and were to be protected by depositing riprap around them to a specified height.

The "locality" in the two classes of cases was the same. They were permanent structures in the bed of the stream. The determining consideration was the character and purpose of the structure. The tort in *The Raithmoor* and in *The Blackheath* was maritime not because of the place of the accident, but because the structure injured was in the channel for purposes of navigation.

4. There are obvious difficulties in the way of extending admiralty jurisdiction to a tort arising *ex contractu* when the contract itself is non-maritime. Persons engaged in building a vessel are doing non-maritime work. The uncompleted vessel, though subject to limited admiralty jurisdiction after launching (*Tucker v. Alexandroff*, 183 U. S. 424), remains a structure under state control. *The Victorian*, 24 Ore. 121, cited in *The Winnebago*, 205 U. S. 354. Common law and statutory duties are imposed upon an employer of workmen on such a structure as a result of the relation between them created by the employment contract. These duties are frequently affected by the terms of the contract. A workman particularly engaged to do a dangerous piece of work has a very considerably limited right to a safe place to work. What the contract means, what duties are imposed upon the master by reason of the employment, and what recourse the servant

may have if injured in the work are all matters determinable by state law. The grant of admiralty jurisdiction contemplates the administration of the general rules of the maritime law; *Knickerbocker Ice Co. v. Stewart*, 40 Sup. Ct. 438; and there is an apparent anomaly in the extension of that jurisdiction, because of the accident of locality, to rights of action founded upon and controlled by state law.

It is frequently said that the admiralty courts within the limits of their jurisdiction are free to determine the rights of litigants unhampered by state legislation. *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372. If the jurisdiction may be extended through the chance of locality to transactions non-maritime in character, the necessary consequence is the extension of the general rules of the maritime law to such transactions. If the servant injured after launching is to look to the maritime law for his remedy, the master necessarily must be governed by that law in contracting for his labor.

The nature and extent of a duty imposed by law because of a contract relation cannot be determined without consideration of the contract itself. The limitation upon the duty of a common carrier to a free passenger by the terms of the pass illustrates the point. *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440. Therefore the

assumption of jurisdiction to determine the tort question implies a like assumption of jurisdiction to determine the contract relations of the parties; and to apply this to ship construction results in an encroachment upon the power of the states not hitherto attempted.

5. *The Winnebago, supra,* held that the states could legislate with respect to attachment and sale of vessels under construction, after launching as well as before, approving the earlier decisions that admiralty jurisdiction does not extend to contracts for the construction of vessels. The general maritime law is designed to secure uniformity in respect of maritime affairs. *Southern Pacific v. Jensen,* 244 U. S. 205. No requirement of maritime commerce compels uniformity in shipbuilding throughout the country; and it seems obvious that nothing in state regulation of the master and servant relation in ship construction work, interferes with the proper harmony and uniformity of the maritime law in its international and interstate relations.

In every state which has navigable waters there are industries having less connection with maritime affairs than shipbuilding but in which workmen are called upon to perform services on the water. Compensation laws are designed to protect the workmen in these industries equally with

those in other hazardous employments, but if damage suits in admiralty are possible when accidents occur on the water, the states are deprived of power to substitute for the wasteful damage litigation, salutary compensation laws; and there is placed under the admiralty jurisdiction a master and servant relation in no respect maritime and which otherwise is wholly and properly under state control.

6. Finally it may be observed that in each of the recent master and servant cases in which admiralty jurisdiction was sustained, the decision made clear that the employment was a maritime contract and the work maritime in its nature. In *Southern Pacific v. Jensen, supra,* the court said:

> "The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction."

In *Chelentis v. Luckenbach S. S. Co., supra,* it was said that:

> "The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the

> parties' rights and liabilities were matters clearly within the admiralty jurisdiction."

And in *Knickerbocker Ice Co. v. Stewart, supra,* reference was made to the fact that the workman was employed as a bargeman and was doing work of a maritime nature; and the New York compensation statute was held ineffective as to *maritime* employment. The court said:

> "Obviously if every state may freely declare the rights and liabilities incident to *maritime* employment, there will at once arise the confusion and uncertainty which framers of the constitution both foresaw and undertook to prevent." (Italics ours.)

II.

The second question assumes that admiralty jurisdiction may extend to shipbuilding work on navigable waters, and upon that assumption asks whether or not an election to come under the Oregon compensation law bars recovery in damages in an admiralty suit.

The Oregon statute differs from the New York Compensation Act (before this court in *Southern Pacific v. Jensen, supra,* and *Knickerbocker Ice Co. v. Stewart, supra*), in that it is applicable only when both employer and workman

choose to have the employment come under its provisions. By such election the workman is assured stated compensation if injured and gives up all rights of action for damages. (Laws of Oregon, 1913, Sec. 12.) Prior to the injury upon which this suit is based, both parties had taken the appropriate steps for bringing the work to be done under the Act; and if the statute is effective, libelant has no right of recovery against the Ship Company.

1. As was said in *Southern Pacific v. Jensen, supra*, it is difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. Lien rights may be created, pilotage fees fixed, and the right given to recover in death cases. But, according to that decision, it is equally well established that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits; and the rule was laid down (and repeated in the *Chelentis* case and the *Stewart* case), that:

> "No such legislation is valid if it contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

Applying this test in the *Jensen* case, the court declared the New York Compensation Act ineffective as to stevedoring; and in the *Stewart* case the court reached a similar conclusion (notwithstanding the amendment to the saving clause of Section 9 of the Judiciary Act), as to the work of barging on navigable waters.

These decisions reduce the question in this case to a small compass. A compulsory compensation law, that is, one which of its own force takes away existing rights and liabilities and imposes new and different obligations cannot constitutionally be applied to maritime work. To so apply it would destroy the uniformity in respect to maritime affairs which the Constitution was designed to establish. If the Oregon Act, effective to alter rights and liabilities only upon the election of the parties concerned, can be applied to ship construction after launching without interfering with the proper harmony and uniformity of the general maritime law, it is free from constitutional objection and may be enforced.

The Oregon statute disclaims any purpose to interfere with the general maritime law. It offers to employers and workmen in hazardous enterprises subject to state regulation, a compensation plan which at their option may be substituted for the wasteful and unjust system of awarding damages for negligence. And if the application of

this plan to shipbuilding on the water is an entry into the field of concurrent jurisdiction with admiralty, and this we deny, its provisions for voluntary contributions by the employer and the voluntary cession by the workman of the right to sue for damages—in any court—fall short of the limits prescribed for state legislation in the *Jensen* and *Stewart* cases.

The District Court in overruling exceptions to the libel held that no state statute could affect in any way rights given by the maritime law. *Rohde v. Grant Smith-Porter Ship Co.*, 259 Fed. 304. Upon the trial the court applied the *Jensen* case, stating that the Oregon Act was similar to the New York Act so far as the question at issue was concerned. *Rohde v. Grant Smith-Porter Ship Co.*, 263 Fed. 204. It may be said by way of explanation that the case was tried before the decision in the *Stewart* case, and the Ship Company relied upon the amendment to the saving clause condemned in the *Stewart* case rather than upon the distinction between the New York Act as applied to maritime work and the Oregon Act as applied to shipbuilding.

2. We think it clear that the trial court has misapplied the rule of the *Jensen* case. Many cases establish that state statutes may affect the maritime law to be administered in the admiralty

courts. *The Lottawanna,* 21 Wall. 578; *Butler v. Boston & S. S. S. Co.,* 130 U. S. 527, *The Corsair (Barton v. Brown),* 145 U. S. 335; *The Hamilton (Old Dominion S. S. Co. v. Gilmore),* 207 U. S. 398. As pointed out by Mr. Chief Justice Marshall in *U. S. v. Bevans,* 3 Wheaton 336, 388, the cession of cases of admiralty and maritime jurisdiction is not a cession of the waters upon which these cases arise. It was said in that case:

> "* * * in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction. It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away."

The reasons for restricting the power of the states in this particular are plainly stated in the *Jensen* case. Maritime commerce as well as interstate commerce cannot be hampered by restrictive legislation; nor can the states interfere with the uniformity of regulation which such commerce requires. It was said in *Bowman v. Chicago &*

N. W. Ry. Co., 125 U. S. 465, 507, and quoted in the *Jensen* case, that:

> "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

The *Imbrovek* case (*Atlantic Transport Co. v. Imbrovek, supra*), declared that the work of loading a vessel had a direct relation to maritime commerce. It was said that:

> "Upon its proper performance depends in large measure the safe carrying of the cargo and the safety of the ship itself."

The *Jensen* case determined that because of this relation to maritime commerce, the liability of employer to servant in that work was a subject national in its character admitting and requiring uniformity of regulation; and the right of a state to impose new obligations such as those of the New York compensation statute was denied, the court saying:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute,

other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

In the *Chelentis* case, *supra*, a like conclusion was reached as to the rights of a seaman in case of injury. Here the court said:

"Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no state has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' "

In the *Stewart* case the same principle was applied to the work of a bargeman on navigable waters. Because the work pertained to maritime affairs, the State of New York was declared to be without power to materially change the rights and liabilities of the master and servant.

3. These decisions indicate the tests to be applied in the case at bar: (a) Does the subject sought to be reached by the Oregon statute bear such a relation to maritime commerce as to make it national in character requiring uniformity of regulation; and (b) if so, does the application of the statute to shipbuilding destroy or impair the uniformity in respect to maritime affairs contemplated by the Constitution?

(a) The character of ship construction work we have already discussed. The authorities previously cited leave no room for doubt that ship construction, whether before or after launching, is universally classed as local rather than national; and apart from any question of precedent, it seems obvious that nothing in work of that kind requires, or even admits, of uniformity of regulation throughout the country.

(b) It is equally clear, as we think, that the application of the Oregon Act to shipbuilding affects in no way the needed uniformity in maritime matters. Unlike the New York Act, the Oregon

statute wipes out no rights or obligations existing under the maritime law; nor does it, of its own force, alter in the slightest degree the rights and remedies enforcible in the courts of admiralty. Ships coming into Oregon ports are subjected to no obligations and no restrictions are imposed which in any way tend to hamper or interfere with freedom of navigation between the states and foreign countries. If uniformity in respect to maritime affairs forbids legislation changing existing rights and liabilities in ship construction (an absurd assumpton, as we think), nothing in the Oregon Act denies to the ship builder or his workman, the full measure of whatever maritime rights may exist.

The Oregon statute says to ship builders and others engaged in hazardous enterprises within its borders, and to their employes: the State of Oregon offers you a plan to insure the compensation of employes when injured, which plan you may accept or reject at your pleasure. If you do not take advantage of it, your rights and obligations (whether under state law or under maritime law), remain as before; if you do take advantage of the plan, employers must contribute stated sums and they will be freed from liability for damages, whether sued in the state courts or in admiralty, and employes will be assured of compensation when injured regardless of the question of

negligence, but they must give up all right to sue for damages.

Such a statute supplements the existing law without taking away existing rights or imposing new liabilities; and as we read the *Jensen, Chelentis,* and *Stewart* cases, the statutes there considered were condemned because they wiped out rights secured by the maritime law and undertook to impose new liabilities. The Oregon statute instead of depriving parties of rights under the maritime law, merely proposes and offers to supervise an agreement between master and servant to substitute a compensation plan for the wasteful damage action based on negligence. Acceptance of this plan by the workman, and not the mandate of the statute, brings about the relinquishment of the right to claim damages. The statute does not impair rights existing under the maritime or under any law; it provides merely for machinery under which the workman may secure a safer and better remedy in lieu of the uncertain damage claim.

The decisions in the *Jensen* and *Stewart* cases indicate that the New York Act was declared inoperative as to maritime work because it was a *compulsory* compensation law. It offended against the rules stated because it undertook to wipe out the rights and obligations existing under the maritime law and substituted in their place ex-

clusive rights and remedies incapable of enforcement in any court; and the result was an interference with the proper harmony and uniformity of the maritime law in its international and interstate relations. The Oregon statute as applied to shipbuilding attempts no such drastic changes. If it affects the maritime law at all, it is supplementary merely and is not violative of the principle of uniformity which governs.

4. We are not able to find that there is any principle of public policy in the maritime law forbidding an agreement under which a party surrenders in advance a right of action for damages. Under the common law of many states (Oregon included) a master could not stipulate for exemption from the consequences of his negligence. But the policy of the State of Oregon has now been changed with respect to agreements to surrender rights of action for negligence upon acceptance of the compensation act. Such an acceptance results in making an advantageous arrangement for compensation supervised and guaranteed by the state, and it includes a stipulation not to sue. Such an arrangement certainly would not injuriously affect or subvert the public interests; and this was the test at common law (1 Storey Equity Jurisprudence, Section 160-note).

5. Nor is the acceptance of the compensation plan in lieu of the right to claim damages (in common law or in admiralty) an agreement to deprive admiralty of jurisdiction. The transaction deals with the substantive rights of the parties and no question of jurisdiction is involved. Without doubt those rights, even as to transactions on navigable water, may to an extent attempted to be defined in the *Jensen* case be changed or affected by state legislation; and if within the limits so defined state legislation acting through the voluntary agreement of the parties has changed their substantive rights, the changes are controlling whether the litigant be in admiralty or in the common law courts. As said in *Ex Parte McNeil*, 13 Wall. 236, 243:

> "A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty or of common law."

When the essentials to jurisdiction exist, the parties may go to the admiralty court as to any other court, but they can enforce in that court only the rights they have. If the workman through voluntary election has determined that the compensation law is best for him, by his choice he has given up all right to damages which might have existed under any law; and the statute providing the machinery for such a choice is not to

be condemned as an attempt to deprive admiralty of jurisdiction. In this respect it does not differ from state statutes affecting common law rights under the saving clause; and a choice of these rights usually means a relinquishment of the right to sue in admiralty.

6. Maritime commerce, like interstate commerce on land, may not be hampered by restrictive state laws; and non-action by Congress on any phase of regulation is equivalent to a declaration that in that particular there shall be no regulation. But as indicated by *The Hamilton*, 207 U. S. 398, there may be valid state regulation touching the subject; and the line is drawn between statutes which supplement and those which destroy or impair the general rules of the maritime law. The *Imbrovek* case determined that the work of loading a ship bore a direct relation to maritime commerce and the question of liability for injuries was governed by maritime law; and the *Jensen* case held that a state statute attempting materially to alter that liability could not be enforced.

Shipbuilding, we contend, bears no such relation to maritime commerce as makes it a subject national in character requiring only regulation by Congress. This court has held that men building a railroad later to be used in interstate commerce were not engaged in such commerce, and refused to apply to them the Employers' Liability Act.

Raymond v. C. M. & St. P. Ry. Co., 243 U. S. 43. The launching of a ship does not change the construction work yet to be done so as to give it a national rather than a local character; and we can conceive of nothing in the manner in which such work is done requiring uniform regulation throughout the country. Certainly the master and servant relation as to work on the ways is properly under state regulation. To cut off that authority at the moment of launching and because of the launching alone is to invade the field of state jurisdiction beyond what has been suggested in any case.

But if we are wrong in this and the work of shipbuilding after launching does require uniformity of regulation and does forbid state legislation materially altering rights and liabilities of master and servant, we contend that the Oregon compensation law accomplishes no such result. It adds to the existing maritime rights (if the parties to the shipbuilding contract have any such) a salutary plan for workmen's compensation which they may take or reject at their pleasure. This supplements the maritime law more truly, as we think, than the Delaware statute (sustained in *The Hamilton, supra*), imposing a new liability on ships in maritime commerce.

CHARLES H. CAREY,
JAMES B. KERR,
CHARLES A. HART.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. [redacted]35

GRANT SMITH-PORTER SHIP COMPANY
vs.
HERMAN F. ROHDE.

BRIEF FOR HERMAN F. ROHDE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 304

GRANT SMITH-PORTER SHIP COMPANY
vs.
HERMAN F. ROHDE.

BRIEF FOR HERMAN F. ROHDE

STATEMENT

This case originated in the District Court of Oregon in a libel *in personam*, for damages for personal injuries to Herman F. Rohde, employed as a carpenter and ship joiner on a "substantially completed" (R., p. 1) vessel being constructed by the Grant Smith-Porter Ship Company. The case is here on certificate from the Ninth Circuit Court of Appeals, to which Grant Smith-Porter Ship Company appealed from a judgment entered against it in the District Court. The negligence alleged was in the "construction and the maintenance of a scaffold." At the time of the injury the "Workmen's Compensation Law" of Oregon

(112 Laws of Oregon 13, as amended Chapter 271 Laws of 1915, and Chapter 288 Laws of 1917), was in effect and applied to hazardous occupations, including shipbuilding.

This law applies automatically unless an employer or workman notify the proper State authority if it is desired not to come under the Act. Neither of the parties hereto so notified the proper State authority in accordance with the terms of the Workmen's Compensation Act, but the Grant Smith-Porter Ship Company had taken all the steps required by the Compensation Act to bring the work under its provisions; and there had been deducted and paid over to the commission administering the compensation fund payments from wages earned and paid libelant, the workman, up to the time of the injury. Workmen coming under the provisions of this Act are entitled to receive specific payments in the event of injury, and the Act provides (Sec. 12) "and the right to receive such sum, or sums, shall be in lieu of all claims against his employer on account of all such injury or death, except as hereinafter specifically provided."

The Circuit Court of Appeals asks:

"(1) Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?"

"(2) Is libelant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"

ARGUMENT

I

(1) So that there may be no misunderstanding as to the issue, it is conceded by the libelant that the con-

struction of a contract for the building of a ship, or for the supplying of materials going into the construction of a vessel, is not the subject of admiralty jurisdiction. The cases cited on behalf of the respondent (p. 5 of its brief), establish the foregoing doctrine. In the Northern Pacific Steamship Company vs. Hall Brothers Marine Railway and Steamship Company, 249 U. S. 119, it is stated:

> It must be taken to be the settled law of this Court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality—whether the act was committed in navigable waters or not—in matters of contract it depends upon the subject matter—in the character of the contract.

The question certified in this case does not touch upon the construction of any contract between the libelant and the respondent, or between the respondent and the U. S. Shipping Board and Emergency Fleet Corporation for which the vessel on which the injury occurred was being built.

2. The true test is locality.

> In regard to tort, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not and never—I believe—deliberately claimed to have any jurisdiction over torts except such as are maritime torts, that is, such as are committed on the high seas, or on the waters within the ebb and flow of the tide.
>
> Thomas vs. Lane, 2 Sumn. 1, 9 Fed. Cas. No. 13902.

In Atlantic Transport Co. vs. Imbrovek, 234 U. S.

52, on page 50, speaking of the definition of Mr. Justice Story in Thomas vs. Lane, above quoted, this Court says:

> "This rule (that locality furnishes the test) has been frequently reiterated with the substitution of navigable waters for tide waters."

Prior to the time of libelant's injury, this steamer on which libelant had been working had been launched in the Willamette River in Portland, Ore., and in part of the navigable waters of the United States (R., p. 1). In Johnson vs. Chicago P———Elevator Co., 119 U. S. 388, the jib boom of a vessel being towed through the Chicago River struck a house on the shore and injured it. Admiralty jurisdiction was denied, the Court saying:

> The substance and consummation of the wrong having taken place on land and not in *navigable waters* and the cause of action not having been completed on such water, admiralty jurisdiction could not be invoked.

The foregoing case and Martin vs. West, 222 U. S. 191, both of which appear in respondent's brief, illustrate very clearly the distinction hereinbefore referred to. The fact that the injury is consummated on navigable waters is the test. Martin vs. West came to this Court on error from the Supreme Court of the State of Washington. It appeared that a vessel collided with the pier of a bridge causing one of the spans to fall into the river. It was argued that the substance and consummation of the wrong took place in the river. This Court said the difficulty:

> Must be resolved according to the locality of the injured thing—the bridge with its spans and supporting piers at the time of the collision. It was then that the casual influence of the negligent management of the vessel took effect and gave rise to a cause of action, and what followed is important only as bearing upon the incident of the injury and the resulting liability.

In fact, in all the cases from the decision in The Plymouth (Hough vs. Western Transport Company), 3 Wall 20; 18 Law Ed. 125, down to Atlantic Transport Co. vs. Imbrovek, *supra*, it has been said:

> The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality, the high seas or navigable waters where it occurred. The Plymouth (Hough vs. Western Transport Co.) 3 Wall 20; 18 Law Ed. 125.

In Tucker vs. Alexandroff, 183 U. S. 424, it appeared that Alexandroff had been taken into custody as a deserter from the Russian Navy and sought release on a *habaes corpus* which was granted by the District Court and the Circuit Court of Appeals affirmed this action. The facts were that he had been sent from Russia to this country as part of an unorganized crew, to man a ship of war being built in this country for the Russian Government and not completed. It appeared that the Russian Government might reject the ship. Nevertheless, this Court on *certiorari* reversed the trial court, and in that case it was said:

> A ship is born when she is launched and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron

—an ordinary piece of personal property—as distinctly a land structure as a house and subject only to mechanics' liens as created by State law and enforceable in the State courts. In the baptism of launching she receives her name and from the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract and is individually liable for her obligations, upon which she may sue in the name of her owner and be sued in her own name. Her owner's agents may not be her agents; her agents may not be her owner's agents * * * so sharply is the line drawn between a vessel upon the stocks and a vessel in the water that the former can never be made liable in admiralty either *in rem* against herself, or *in personam* against her owners, upon contracts or for torts while, if in taking the water during the process of launching, she escapes from the control of those about her, shoots across the stream and injures another vessel, she is liable to a suit *in rem* for damages.

TWO.

1. Is the Oregon statute in so far as it affects purely maritime matters, essentially different from the New York statute condemned in the Knickerbocker Ice Co., vs. Stewart decision (40 Supreme Court U. S. 438)? If it is not, then by force of that decision the second question certified must also be answered in the affirmative. Even though it be not substantially the same in its effect, still if the Oregon statute is an invasion of the uniformity required in admiralty matters, it is open to the same objection as was the New York statute and the question must still be answered in the affirmative.

2. The Oregon statute is not in terms compulsory on the parties. Yet an inspection of its terms will show

that in effect and in practical operation, at least in respect to shipping that might put into Oregon ports for three or four days for temporary repairs, it is compulsory. That Act applies to hazardous occupations, specifically referring to "shipbuilding occupations" (see Sec. 13, paragraph d). Section 14 undertakes to define the meaning of various terms descriptive of "hazardous occupations," but its definition does not include the phrase "shipbuilding operations." Let us suppose that Rohde, the libelant, a ship's carpenter or member of the crew of a foreign ship temporarily in one of the ports of Oregon repaired "a bulkhead enclosing certain tanks in the vessel" (R. p. 1). Neither the employer nor Rohde notified the appropriate State authorities of the respective intentions not to be bound by the "workmen's Compensation Act," and no deductions were made by the employer from Rohde's wages. In such event Rohde would be performing precisely the same kind of work that he was doing when the injury complained of in the instant case occurred.

The employer under the terms of the Act is liable for the payments which the Act requires and is subject to a penalty for not so paying. (Sec. 24.) The terms of the Oregon statute in such a case are such that it would make it compulsory, for its operation is automatic unless "prior to or within three days of the time of becoming such employer," such employer shall notify the State authorities of its intention not to be bound. It might well be that the relation of employer and employee might have begun long before the entry of the vessel into Oregon waters, in which event it would be impossible to give the required notice "prior to or within three days of THE TIME OF BECOMING SUCH EMPLOYER." In fact it might be that the vessel had

never intended to make an Oregon port but was forced into the same by stress of weather, or other conditions temporarily beyond its power, yet, under the plain terms of the Act, the State law would prevail. It seems quite plain that the rights and responsibilities of a ship's carpenter, or members of her crew, are proper subjects for an admiralty court yet if the State law applies, then two courts might apply different rights according to different standards which has been condemned in Southern Pacific vs. Jensen, 244 U. S. 205, *supra*, and this notwithstanding the fact that a vessel becomes subject to admiralty jurisdiction the moment she is launched. Tucker vs. Alexandroff, 183 U. S. 424.

3. This court has repeatedly said that the framers of the Constitution intended to adopt as an entirety a system of admiralty law that might be uniform in its operation throughout the nation.

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulations of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character, except the intercourse of the States with each other and with foreign states.
>
> The Lottawanna (Rodd vs. Heartt), 21 Wall 558.

If uniformity is sought, then the power lies with Congress alone to enact a uniform law, as it cannot be expected that the several States will agree on a uniform law and the very fact that the Oregon statute differs in some respects from the statutes adopted by other States, defeats the uniformity required.

4. Even the saving clause adopted by the amendment to the judicial code which undertook to permit the application of workmen's compensation laws to injuries within admiralty jurisdiction, does not save the situation, because it is beyond the power of Congress to so legislate.

> Having regard to all those things, we conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by Southern Pacific Co. vs. Jensen. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.
>
> And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.
> * * *
>
> Knickerbocker Ice Co. vs. Stewart, 40 Supreme Court 438.

5. In the case at bar the libelant, if he exercised any election at all, did so in advance of his injury and in this view of the case it would seem that the Oregon statute is against public policy in that it undertakes to relieve the

employer in advance from his responsibility for his negligence. This principle is so well established that no citation of authorities is deemed necessary.

Since locality furnishes the exclusive test in admiralty and in the case at bar the injury occurred on a ship after launching, lying in navigable waters of the United States and since it is the policy of the law and so intended by framers of the Constitution that uniformity obtain in the administration of the admiralty law, it is respectfully submitted that both questions propounded by the Circuit Court of Appeals be answered in the affirmative.

Respectfully,

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